Sykt Panon Sdn Bhd v Platinum Best Engineering Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02–2011 OF 2011 AND Q-02–2012 OF 2011
RAMLY ALI, ABDUL AZIZ ABDUL RAHIM AND ZAWAWI SALLEH JJCA
19 OCTOBER 2016

Contract — Claims — Claims for work done — Appeal against decision of High Court — Summary judgment — Actual amount payable — Whether identified — Whether claimant entitled to retention sum — Whether works completed — Whether claimant entitled to claim for works done — Whether judicial appreciation of evidence adequately exercised

There were two appeals emanating from the decision of the High Court in two suits namely, Appeal No 2011 and Appeal No 2012 ('the 2005 Suit' and 'the 2007 Suit' respectively). In both suits, the plaintiff was Syarikat Panon Sdn Bhd ('PSB') and the defendant was Platinum Best Engineering Sdn Bhd ('PBE'). In the 2005 Suit, PSB claimed for judgment sum of: (a) RM1,255,195.07 being monies owing under payment certificates Nos 28, 29, 29(a) and 30 ('prayer 37(5)'); and (b) judgment for the sum of RM1,897,506.76 being monies not certified and/or under-certified for the variation works and completed steel structure work at FRST-EL building. In the 2007 Suit, PSB claimed for, inter alia, (i) judgment for the sum of RM525,177.79 being the amount due under progress payment certificate Nos 31, 32, 33 and 34 ('prayer 28(1)'); and (ii) judgment for the sum of RM1,774,400 being the retention sum deducted by PBE from the sub-subcontract price paid to the PSB. PBE counterclaimed against PSB in both suits for: (A) loss of RM4,759,436.80 resulting from taking back works; and (B) RM17,374,739.20 being liquidated and ascertained damages for delays. The High Court judge allowed PSB's claim in the 2005 Suit only in respect of prayer 37(5) while the rest of the prayers were disallowed. With regard to 2007 Suit, the High Court judge only allowed prayer 28(1) while the rest of the prayers were dismissed. The High Court judge also dismissed the PBE's counterclaims in both suits 2005 and 2007. In these appeals, PSB appealed for the claim for the judgment sums of RM1,897,506.76 and RM1,774,400. PBE also appealed against part of the decision of the High Court judge in both suits. PBE appealed against the order of the High Court allowing prayer 37(5) in the 2005 Suit; and prayer 28(1) in 2007 Suit. PBE appealed against the dismissal of its counterclaims in both suits 2005 and 2007. PBE also appealed against the order of costs awarded by the High Court.

Held, allowing Appeal No 2011 with costs; dismissing Appeal No 2012 with costs:

(1) The learned judge should have made a determination what was the actual amount payable after taking into account the amounts owing under the relevant interim payment certificates and other sums owing between the parties. Based on the interim certificates PSB had applied for summary judgment to the court. But the application was rejected. This showed that PSB need to prove the amount certified in the certificates or the amount that was not certified. More importantly, PSB never appealed against that decision. Thus on the balance of probability the interim certificates were neither final nor conclusive. Therefore this part of the appeal by PSB was dismissed (see para 43).

(2) PSB was not entitled to the retention sum. Firstly, it was a fact that PSB never completed the work. The sub-subcontract was terminated by PBE. However, the termination was based on the reason which PBE said, had adversely affected the progress of the project. Secondly, with regard to the termination, PSB in its claim had pleaded for damages for wrongful termination. However, this head of claim was refused by the learned judge and it was not pursued by PSB in the present appeal. This gave the inference that PSB accepted the termination of the contract as valid for its failure to complete the works. Therefore, it could not be right to say that PSB could rely on the termination of the contract to justify the return of the retention sum. Moreover, PBE had spent monies on ratification works after taking over the works that were supposed to be completed by PSB after the termination (see para 44).

(3) At first glance at Suits 2005 and 2007, there appeared to be duplicity in PBE's counterclaims against PSB. However both suits were consolidated and heard together. Therefore the two counterclaims in the suits merged into one wherever there was duplicity. More so when the counterclaims substantially arose from the same set of facts. Thus, the presence of duplicity in the counterclaim was not a valid ground for the learned judge to dismiss the same. What the learned judge ought to have done was to consider whether the claims were proven. If proven then they should be allowed to extent it was justified by the proven facts and the evidence by having regard to the purported duplicity (see para 50).

(4) The learned judge had not adequately analysed the evidence adduced by PBE in support of its counterclaim for the total sum of RM9,299,821.01 after taking into account the retention sum which had been utilised to offset the claim which total amount had come up to RM 11,372,243.52. The learned judge deemed it fit to dismiss the counterclaim by making a sweeping statement that 'common sense dictates that producing before the court a complicated mass of unsubstantiated facts and figures ... without more, does not constitute proof of sums claimed'. Therefore, the

learned judge had not adequately exercised judicial appreciation of the evidence in so far as it related to PBE's counterclaim. In consequence, the court disagreed with His Lordship's decision to dismiss PBE's counterclaim for the sum of RM9,299,821.01 (see para 56).

[Bahasa Malaysia summary

Terdapat dua rayuan yang timbul daripada keputusan Mahkamah Tinggi dalam dua guaman iaitu, Rayuan No 2011 dan Rayuan No 2012 ('Guaman 2005' dan 'Guaman 2007' masing-masing). Dalam kedua-dua guaman, plaintif adalah Syarikat Panon Sdn Bhd ('PSB') dan defendan adalah Platinum Best Engineering Sdn Bhd ('PBE'). Dalam Guaman 2005, PSB menuntut untuk jumlah penghakiman berjumlah: (a) RM1,255,195.07 iaitu wang yang terhutang di bawah perakuan-perakuan bayaran No. 28, 29, 29(a) dan 30 ('permohonan 37(5)'); dan (b) penghakiman untuk jumlah RM1,897,506.76 iaitu wang yang tidak disahkan dan/atau kurang disahkan untuk kerja pengubahan dan kerja struktur besi yang siap di bangunan FRST-EL. Dalam Guaman 2007, PSB menuntut untuk, antara lain: (i) penghakiman untuk jumlah RM525,177.79 iaitu jumlah yang perlu dibayar di bawah perakuan bayaran prestasi No 31, 32, 33 dan 34 ('permohonan 28(1)'); dan (ii) penghakiman untuk jumlah RM1,774,400 iaitu jumlah taruhan yang dipotong oleh PBE daripada harga sub-subkontrak yang dibayar kepada PSB. PBE menuntut balas terhadap PSB dalam kedua-dua guaman untuk: (A) kerugian RM4,759,436.80 yang disebabkan kerana mengambil balik kerja; dan (B) RM17,374,739.20 iaitu ganti rugi cair dan tentu untuk kelewatan. Hakim Mahkamah Tinggi telah membenarkan tuntutan PSB dalam Guaman 2005 hanya berkenaan permohonan 37(5) manakala permohonan lain tidak dibenarkan. Berhubung guaman 2007, hakim Mahkamah Tinggi telah hanya membenarkan permohonan 28(1) manakala permohonan lain ditolak. Hakim Mahkamah Tinggi juga telah menolak tuntutan balas PBE dalam kedua-dua Guaman 2005 dan Guaman 2007. Dalam rayuan-rayuan tersebut, PSB telah merayu untuk tuntutan bagi jumlah penghakiman RM1,897,506.76 dan RM1,774,400. PBE juga telah merayu untuk perintah Mahkamah Tinggi membenarkan permohonan 37(5) dalam Guaman 2005 dan permohonan 28(1) dalam Guaman 2007. PBE telah merayu terhadap penolakan tuntutan-tuntutan balasnya dalam kedua-dua Guaman 2005 dan guaman 2007. PBE juga telah merayu terhadap perintah untuk kos yang diawardkan oleh Mahkamah Tinggi.

Diputuskan, membenarkan Rayuan No 2011 dengan kos; menolak Rayuan No 2012 dengan kos:

(1) Hakim bijaksana sepatutnya membuat penentuan tentang jumlah sebenar yang perlu dibayar setelah mengambil kira jumlah yang terhutang di bawah perakuan-perakuan bayaran interim yang relevan dan jumlah lain yang terhutang antara pihak-pihak. Berdasarkan

perakuan-perakuan interim PSB telah memohon untuk penghakiman terus mahkamah. Namun permohonan itu ditolak. Ini menunjukkan bahawa PSB perlu membuktikan jumlah yang disahkan dalam perakuan-perakuan itu atau jumlah yang tidak disahkan. Lebih penting lagi, PSB tidak pernah merayu terhadap keputusan tersebut. Oleh itu atas imbangan kebarangkalian perakuan-perakuan interim tidak muktamad atau konklusif. Oleh itu bahagian rayuan ini oleh PSB ditolak (lihat perenggan 43).

(2) PSB tidak berhak mendapat jumlah taruhan. Pertama, ia adalah fakta bahawa PSB tidak menyiapkan kerja tersebut. Sub-subkontrak itu telah ditamatkan oleh PBE. Walau bagaimanapun, penamatan itu adalah berdasarkan sebab yang dikatakan PBE, telah menjejaskan dengan teruk prestasi projek tersebut. Kedua, berkenaan penamatan itu, PSB dalam tuntutannya telah merayu untuk ganti rugi kerana penamatan salah. Namun begitu, perkara tuntutan ini ditolak oleh hakim yang bijaksana dan ia tidak diteruskan oleh PSB dalam rayuan ini. Ini memberi inferens bahawa PSB menerima penamatan kontrak itu sebagai sah kerana kegagalannya untuk menyiapkan kerja-kerja tersebut. Oleh itu, ia tidak mungkin betul untuk mengatakan bahawa PSB boleh bergantung kepada penamatan kontrak itu bagi mewajarkan pulangan jumlah taruhan itu. Tambahan pula, PBE telah membelanjakan wang itu untuk kerja-kerja ratifikasi selepas mengambil alih kerja-kerja yang sepatutnya disiapkan oleh PSB selepas penamatan itu (lihat perenggan 44).

(3) Melihat pertama kali Guaman 2005 dan Guaman 2007, kelihatan penggandaan dalam tuntutan balas PBE terhadap PSB. Walau bagaimanapun kedua-dua guaman telah disatukan dan didengar bersama. Oleh itu kedua-dua tuntutan balas dalam guaman-guaman tersebut bergabung menjadi satu di mana terdapat gandaan. Lebih lagi apabila tuntutan balas secara substantial timbul daripada set fakta yang sama. Oleh itu, kewujudan gandaan dalam tuntutan balas bukan alasan sah bagi hakim yang bijaksana menolak yang sama. Apa yang sepatutnya dilakukan oleh hakim yang bijaksana adalah untuk mempertimbangkan sama ada tuntutan-tuntutan itu telah dibuktikan. Jika dibuktikan maka mereka patut dibenarkan untuk melanjutkannya adalah wajar dengan fakta dan keterangan yang dibuktikan dengan mengambil kira gandaan yang dikatakan itu (lihat perenggan 50).

(4) Hakim yang bijaksana tidak menganalisis secukupnya keterangan yang dikemukakan oleh PBE bagi menyokong tuntutan balasnya bagi keseluruhan jumlah RM9,299,821.01 setelah mengambil kira jumlah taruhan yang telah digunakan untuk mengetepikan tuntutan yang mana keseluruhan jumlahnya adalah RM11,372,243.52. Hakim yang bijaksana menganggap ia sesuai untuk menolak tuntutan balas itu dengan membuat kenyataan bahawa 'common sense dictates that

producing before the court a complicated mass of unsubstantiated facts and figures ... without more, does not constitute proof of sums claimed'. Oleh demikian, hakim yang bijaksana tidak cukup menggunakan pemahaman kehakiman berhubung keterangan setakat mana ia berkaitan tuntutan balas PBE. Akibatnya, mahkamah tidak bersetuju dengan keputusan Yang Arif untuk menolak tuntutan balas PBE bagi jumlah RM9,299,821.01 (lihat perenggan 56).]

Notes

For cases on claims for work done, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 4158–4161.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89, KBD (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)

Appeal from: Suit Nos 22–63 of 2005-III/I and 22–166 of 2007-I (High Court, Kuching)

Siti Emiliana bt Mohamad Edmund (Arthur Lee, Lin & Co) in Civil Appeal No Q-02–2012 of 2011 for the appellant.
Sim Hui Chuang (Lim Lip Sze with him) (Reddi & Co) in Civil Appeal No Q-02–2011 of 2011 for the appellant.
Sim Hui Chuang (Lim Lip Sze with him) (Reddi & Co) in Civil Appeal No Q-02–2012 of 2011 for the respondent.
Siti Emiliana bt Mohamad Edmund (Arthur Lee, Lin & Co) in Civil Appeal No Q-02–2011 of 2011 for the respondent.

Abdul Aziz Abdul Rahim JCA:

[1] There are two appeals before us. They are Appeal No Q-02–2011 of 2011 ('Appeal No 2011') and Appeal No Q-02–2012 of 2011 ('Appeal No 2012'). These two appeals emanated from the decision of the High Court at Kuching given in two suits namely, Suit No 22–63–2005-III ('the 2005 Suit') and suit No 22–166–2007-I ('the 2007 Suit') which were consolidated and heard together. In both suits, the plaintiff was Syarikat Panon Sdn Bhd ('PSB') and the defendant was Platinum Best Engineering Sdn Bhd ('PBE').

[2] In the 2005 Suit, PSB claims for the following:

(a) judgment for the sum of RM1,255,195.07 being monies owing under payment certificates Nos 28, 29, 29(a) and 30;

(b) judgment for the sum of RM1,897,506.76 being monies not certified and/or under-certified for the variation works and completed steel structure work at FRST-EL building; and

(c) interest at the rate of 12%pa on claims (a) and (b) as aforesaid from their respective due dates till the date of judgment.

[3] In the 2007 Suit, PSB claims were as follows:

(a) judgment for the sum of RM525,177.79 being the amount due under progress payment certificate Nos 31, 32, 33 and 34;

(b) judgment for the sum of RM1,389,531.22 being the amount not certified and under-certified by the PBE for the remaining items of the variation works;

(c) judgment for the sum of RM6,011,738 being the cost for taking over the FRST-EL Building and CSD Building (aluminium windows and glazing only). Alternatively, damages to be assessed by the court;

(d) judgment for the sum of RM1,827,405.60 being the value of the work done and materials left on site during the period from 31 July 2005 to 6 September 2005;

(e) judgment for the sum of RM1,774,400 being the retention sum deducted by PBE from the sub-subcontract price paid to the PSB;

(f) judgment for the sum of RM45,000 being the cost of preparation of drawings on as-built levels and the profesional charges of the licensed surveyor for verifying the same;

(g) judgment for the sum of RM52,000 being the loss of use of the two units of machinery detained by the PBE from 6 May 2005 to 31 August 2005. Alternatively, damages to be assessed by the court;

(h) damages to be assessed by the court for late handover of and/or overstaying on site for 13.5 months till 6 September 2005 including the increment in the cost of building materials;

(i) damages to be assessed by the court for unlawful termination of the employment of PSB under the sub-sub general contract, including loss of profit on the remaining part of the works as on 6 September 2005; and

(j) interest on claims (a) until (h) and/or (i) at the rate of 12%pa from their

respective due dates till the date of judgment and at the rate of 8%pa from the date of judgment till final payment.

PBE also had a counterclaim against the PSB in both suits. PBE's counterclaim were as follows:

(a) loss of RM4,759,436.80 resulting from taking back works in respect of FRST Ext Lab and the CSB Building;

(b) RM17,374,739.20 being liquidated and ascertained damages for delays;

(c) damages because of exposure to claims by Taisei-Zecon joint venture and the other sub-contractors of the PBE; and

(d) the sum of RM9,299,821.01 set out in para 31 of the defence and counterclaim in the 2007 Suit being cost and expenses incurred by PBE and payable by the PSB under cl 6.3 of the agreement.

THE JUDGMENT IN THE HIGH COURT

[4] On 5 May 2011, after full trial, the learned High Court judge had allowed PSB's claim in the 2005 Suit only in respect of prayer in para 37(5) that is for judgment sum of RM1,255,195.07 being monies owing under payment certificate Nos 28, 29, 29(a) and 30 and prayer 37(8) in respect of interest on the judgment sum. The rest of the prayers were disallowed. With regard to the 2007 Suit, the learned High Court judge only allowed prayer at para 28(1) that is judgment sum of RM525,177.79 being the amount due under progress payment certificate Nos 31, 32, 33 and 34; with interest at 8% from the date of judgment until full payment. The rest of the prayers in the 2007 Suit were also dismissed.

[5] The learned High Court judge also dismissed the PBE's counterclaims in both suits 2005 and 2007.

[6] The learned judge also ordered that PBE to pay to fifty percent (50%) of taxed costs to PSB.

THE APPEAL

[7] Both parties had filed an appeal against the said learned High Court judge's decision. Appeal No 2011 is by PBE (the defendant before the High Court) and Appeal No 2012 is by PSB (the plaintiff before the High Court). In these appeals, the parties will be referred to as they were before the High Court. Before us, learned counsel for PSB in both appeals informed the court that PSB abandoned all other grounds of appeal except the appeal for the claim for the sum of RM1,897,506.76 being moneys not certified and/or under-certified by

PBE for the variation works and completed steel structure work on FRSTL-EL Building in Suit No 2005; and the claim for the sum of RM1,774,400 being the retention sum deducted by PBE from sub-subcontract price.

[8] PBE is also appealing against part of the decision of the learned High Court judge in both suits. PBE is appealing against the order of the High Court allowing prayer 37(5) of PSB's claim in the 2005 Suit ie for the sum of RM1,255,195.07 being monies owing under payment certificates Nos 28, 29, 29(a) and 30 together with interest and also against the order allowing the PSB's claim in prayer 28(1) in the 2007 Suit for the sum of RM525,177.79 being the amount due under progress payment certificate Nos 31, 32, 33 and 34 with interest. PBE is also appealing against the dismissal of its counterclaims in both suits 2005 and 2007. Finally, PBE is also appealing against the order of costs awarded by the High Court.

FACTS OF THE CASE

[9] PBE was the sub-general contractor of Taisei-Zecon joint venture, which was the main contractor of Universiti Malaysia Sarawak ('UNIMAS') of the Government of Malaysia, in respect of the construction and completion of UNIMAS Development Project — Phase 1 of Stage 1 ('the project').

[10] On or about 9 October 2002, PBE appointed PSB as its sub-subgeneral contractor to construct and complete the contractual works namely: (a) CSD (centre of student development); (b) infrastructure related works; and (c) external works at a contract price of RM48,288,000. The appointment was accepted by PSB vide a letter of acceptance ZEWSB/UMS/CTR/316/SPSB/10–02/0238 dated 9 October 2002.

[11] No formal contract agreement was executed. Nevertheless, para 22 of the letter of acceptance provides, inter alia, as follows:

> ... Until the formal Sub-sub General Contract Agreement is signed, this Letter of Acceptance together with the Conditions of Sub General Contract and Appendices, the Drawing and Technical Specifications shall constitute a binding contract between both parties.

[12] By cl 7 of the letter of acceptance, both parties agreed that the conditions of the subgeneral contract and the appendices specifically copied to PSB shall form the conditions of the contract between them.

[13] PSB duly commenced the execution of the works in accordance with the terms of the letter of acceptance and the conditions of contract.

[14] For variation works, cll 51.1, 51.2, 52.1, 52.4, 53.4, 53.5 and 60.1 (e) under the Part (1) General Conditions of Contract are relevant. For ease of reference, the said clauses are re-produced below:

Clause 51.1 Variations

(a) The Engineer shall make any variation of the form, quality or quality of the works or any part thereof that may, in his opinion, be necessary and for that purpose, or if for any other reason, it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor to do and the Contractor shall do any of the following:

(a) increase or decrease the quantity of any work included in the Contract;

(b) omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor);

(c) change the character or quality or kind of any such work;

(d) change the levels, lines, position and dimensions of any part of the works;

(e) execute additional work of any kind necessary for the completion of the works; or

(f) change any specified sequence or timing of construction of any part of the works.

(b) It is further stated in Clause 51.1 that '... where the issue of any instruction to vary the works is necessitated by some default of or breach of contract by the contractor or for which he is responsible, any additional cost attributable to such default shall be borne by the contractor'.

(c) Clause 51.2 Instructions for Variations

The Contractor shall not make any such variation without an instruction of the Engineer. Provided that no instruction shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an instruction given under this clause, but is the result of the quantities exceeding or being less than those stated in the Bill of Quantities'.

(d) Clause 52.1 Valuation of Variations

All variations referred to in Clause 51 any addition to the Contract price which are required to be determined in accordance with Clause 52 ... shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the contract does not contain any rates or prices applicable to the varied work, the rates and prices in the contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement, the Engineer shall fix such rates or prices as are, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rate or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

(e) Clause 52.4 Day work

The Engineer, may if in his opinion it is necessary or desirable, issue an instruction that any varied work shall be executed on a day work basis. The Contractor shall then be paid for such varied work under the terms set out in the day work schedule included in the Contract and at the rates and prices affixed thereto by him in the Tender.

The contractor shall furnish to the Engineer such receipts or other vouchers as may be necessary to prove the amounts paid and before ordering the materials, shall submit to the Engineer quotations for the same for his approval. In respect of such of the works executed on a day work basis, the Contractor shall, during the continuance of such work, deliver each day to the Engineer an exact list in duplicate of the names, occupation and time of all workmen employed on such work and a statement, also in duplicate, showing the description and quantity of all materials and Contractor's equipment used thereon or therefor other than Contractor's equipment which is included in the percentage addition in accordance with such day work schedule. One copy of each list and statement will, if correct, or when agreed, be signed by the Engineer and returned to the Contractor.

At the end of each month the Contractor shall deliver to the Engineer a priced statement of the labour, materials and contractor's equipment, except as aforesaid, used and the contractor shall not be entitled to any payment unless such lists and statements have been fully and punctually rendered. Provided always that if the Engineer considers that for any reason the sending of such lists or statements by the contractor ... was impracticable he shall nevertheless be entitled to authorize the payment of such works, either as day work, on being satisfied as to the time employed and labour, materials and contractor's equipment used on such works, or at such value therefor as shall, in his opinion, be fair and reasonable.

(f) Clause 53.1 Notice of Claims

Notwithstanding any other provisions of the Contract, if the Contractor intends to claim any additional payment pursuant to any clause of these conditions or otherwise, he shall give notice of his intentions to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.

(g) Clause 53.2 Contemporary Records

Upon the happening of the event referred to in sub-clause 53.1, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Employer's liability, the Engineer shall, on receipt of a notice under sub-clause 53.1, inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as are reasonable and may be material to the claim of which notice has been given.

(h) Clause 53.4 Failure to Comply

If the Contractor fails to comply with any of the provision of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect of thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to sub-clause 67.3 assessing the claim considers to be verified by

contemporary records (whether or not such records were brought to the Engineer's notice as required under sub-clause 53.2 and 5.3.

(i) Clause 53.5 Payment of Claims

The Contractor shall be entitled to have included in any interim payment certified by the Engineer pursuant to Clause 60 such amount in respect of any claim as the Engineer, after due consultation with the Employer and the Contractor, may consider sue to the Contractor provided that the Contractor has supplied sufficient particulars to enable the Engineer to determine the amount due. If such particulars are insufficient to substantiate the whole of the claim, the Contractor shall be entitled to payment in respect of such part of the claim as such particulars may substantiate to the satisfaction of the Engineer. The Engineer shall notify the Contractor of any determination made under this sub-clause, with a copy to the Employer.

(j) Clause 60.1(e)

any other sum to which the Contractor may be entitled under the Contract or otherwise.

SUBMISSIONS BY PSB ON THE CLAIM FOR RM1,897,506.76 AND FOR THE RETURN OF RETENTION SUM OF RM1,774,400

[15] With regard to the Appeal No 2011 (ie PSB's appeal) — a claim for the sum of RM1,897,506.76 — being monies not certified or under-certified by PBE for the variation works and completed steel structure works, learned counsel for PSB submitted that the learned trial judge had misdirected himself on the evidence presented to him when he dismissed PSB's claim on the ground that PSB had failed to prove the said claim.

[16] It was submitted that the claim for variation works were governed by cll 51, 52, 53 and 60 of Part I of the General Conditions of Contract. These relevant clauses had been cited and mentioned above. It was submitted that based on theses clauses there are two ways of claiming for variation works namely (a) through day work as provided by cl 52.4; (b) through notice of claim ie variation order notice as provided by cl 53.1. It was further submitted that PSB had submitted a summary of claims for the said sum as in Schedule II (I)-(4) which can be found at pp 598–600 of the appeal record Vol 1 Part C and the supporting documents for the claim can be found at pp 602–904 of the appeal record Vol 1 and 2 Part C. It was argued that claim for variation work under cl 52.4, the most important thing the said works must be upon the instruction of the engineer. In his submission learned counsel for PSB stated the procedure for claims as follows:

To claim, the Contractor shall furnish to the Engineer receipts or vouchers to prove the amount already paid. During the continuance of the work, deliver each day to the Engineer an exact list in duplicate of the names, occupation and time of all

workmen employed, the description and quantity of all materials and Contractor's Equipment used. The said list will be signed by the Engineer and returned to the Contractor.

Save when the Engineer considers that it is not necessary to do so, the Contractor shall deliver to the Engineer a priced statement of the labour, materials and Contractor's Equipment used at the end of each month. It is further stated that the Engineer shall nevertheless be entitled to authorise payment for such work, either as daywork, on being satisfied as to the time employed and the labour, materials and Contractor's Equipment used.

[17] Therefore, it was submitted that PSB had in fact proved the claims for variation works and are entitled to be paid in full of the variation works which had been made for the said project. To support this submission, learned counsel for PSB had drawn our attention to the numerous variation orders exhibited in the appeal record together with the supporting documents in the form of instruction or confirmation by the engineer together with the drawings wherever is relevant. Learned counsel for PSB had listed these variation orders notices in para 5.7 of his written submission dated 28 August 2013.

[18] With regard to PSB's claim for the refund of the retention sum of RM1,774,400 (Appeal No 2012), the claim was dismissed by the learned judge on the ground that the event stipulated under cl 12 of the letter of acceptance were not complied with. In his ground of judgment the learned judge wrote as follows:

... That brings me to the question of the retention money of RM1,827,405.60 which the Plaintiff is seeking to recover. Clause 12 of the Letter of Acceptance states that 50% of the retention money shall be released upon substantial completion of the works and the balance upon the expiry of the defect liability period. Neither event took place because of the non-completion. Hence the money is not recoverable ...

[19] In this respect, learned counsel for PSB submitted that para 12 of the letter of acceptance and cl 60.3(a) and (b) of part I of the general conditions of contract are applicable in the event that the work has been substantially completed and upon the expiration of the liability period. It was submitted that in this case cl 60.3 is not applicable because PBE had terminated PSB employment as their sub-subcontractor for the project vide letter dated 24 August 2005. However, it was argued that PSB is entitled to the retention sum under cl 63 of part I of the general conditions of contract. Clause 63.3 provides that PSB shall be entitled to receive sums which had been certified by the engineer which include the retention sum after the cost of execution, remedial cost and all other expenses incurred had been ascertained as reflected in which had been issued by PBE to PSB.

[20] It was further submitted that cl 63 provides that 'the plaintiff shall be entitled to the sums as the engineer may certify would have been payable to him upon due completion by him after deducting the cost of execution, remedial cost and all other expenses incurred'. In this regard, it was argued that PSB ought to be allowed the refund of the retention sum because PBE had issued the interim certificate (Penultimate) which shows that the sum of RM589,000 had been adjusted and ascertained to be utilised for the defect works; but there is no demand from PBE to require PSB to rectify the said defect in the first place.

SUBMISSION BY PBE ON PSB'S CLAIM FOR RM1,897,506.76 AND FOR THE RETURN OF RETENTION SUM OF RM1,774,400

[21] In respond to this submission, learned counsel for PBE submitted that PSB's claim for variation as in Schedule II (1)–(4) totaling RM1,897,506.76 were submitted out of the specified time. It was further submitted that there were monthly meetings between PSB's representative, PBE's quantity surveyors and the employer's quantity surveyors in the course of the performance of the sub-subcontract where the validity, rates and amount of quantum of the variation works to be done or claimed were discussed. It was submitted, after these matters were decided and determined by agreement at those meetings, the employer would certify to the main contractor, the amount which would in turn be certified to PBE and ultimately certified to PSB. In his submission, learned counsel for PBE pointed out to the second last column in Schedule II (1)–(4) p 466 of the appeal record Vol 1 Part C, that the figures stated in the said column are the amount which had been agreed and which was then subsequently certified; and payment certificate were issued. It was further submitted that in respect of work or item claimed of which no figure or sum appeared in the second last column in Schedule II (1)–(4), PSB was not entitled to any payment because it had been agreed and decided so at the meetings. It was argued that since PSB did not object to the certification of the relevant variation orders of which had been included in the payment certificate and which had been acted upon by the parties, PSB is now estopped from claiming for the purported variation works. Thus, PBE in resisting PSB's claim for variation work in relying on doctrine of estoppels as laid down in the case *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283.

[22] In respond to the submission by PSB on the refund of the retention sum, learned counsel for PBE submitted that PBE had given PSB the larger amount of RM2,072,422.51. This is shown in the penultimate certificate and also in the PBE's counterclaim and after taking into account the retention sum, the other sums owing or due to PBE, PSB still owes PBE the sum of RM9,299,821.01.

[23] The second argument by PBE in resisting PSB's claim for the return of the retention sum is that PSB had failed to complete the work, a fact which is not in dispute, though PSB's argument is that its inability to complete the work was the result of PBE termination of the sub-subcontract.

PSB'S SUBMISSION ON PBE'S COUNTERCLAIM

[24] As regard PBE's counterclaim against PSB, learned counsel for PSB submitted that the learned High Court judge was correct in dismissing the counterclaim. It was submitted that PBE's counter claim 'consists of confusingly of duplications revolved around the completion of works by PSB at various stages'. It was argued that PBE's counterclaim for RM17,374,739.20 for liquidated ascertained damages (prayer 3 of PBE's counter claim) and RM4,759,436.80 (as additional costs or damages — prayer 2 of the PBE's counterclaim) representing exposure of claims by Taise-Zecon Joint Venture and PBE's other sub-contractors respectively apart from being a frivolous duplication of the foregoing counterclaims has no basis unsupported by authority or any of the provisions of the contract be PBE and PSB. It was also submitted that PBE's counterclaim pursuant to cl 31 of the defence and the counterclaim in the 2005 Suit for the sum of RM9,299,821.10 consist hopelessly not only of duplication with the foregoing counterclaims but also unexplained and unsupported facts and figures.

[25] As to the issue of duplicity in the PBE's claim for damages, it was argued that the claim for damages under prayer (1) is grounded upon alleged delays on the part of PSB in carrying out the works; however learned counsel of PSB in his written submission dated 28 August 2013 contended that the claim is the same claim for LAD of RM17,374,739.20 under prayer (3) of the PBE's counterclaim. It was submitted that the claim prayed for in prayer (1) and (3) of PBE's counterclaim relied on para 9 of the defence and counterclaim which reads:

> 9. The Plaintiff has in breach of the sub-sub contract continually failed to carry out the sub-contract works with due expedition and due diligence and without delay. Repeated notices, reminders and/or warnings had been given to the Plaintiff.

Therefore it was submitted that the basis of the claim under prayer (1) and (3) of PBE's counterclaim is the same, hence the duplicity in the claim.

[26] With regard to the claim for indemnity, it was argued that this claim is premised on the purported exposure of PBE and other sub-subcontractors of PBE to potential claims by third parties resulting from the alleged delay in completing the works by PSB. It was submitted that this is obvious from the reading of para 24 of the defence and counterclaim which was pleaded as follows:

A Further (in addition to the damages under Paragraph 21 above and the sums of RM17,374,739.20 and RM4,759,436.80 pleaded in Paragraphs 22 and 23 above), by reason of the Plaintiff's breaches default and delays aforesaid, the Defendant is liable for damages to and/or is exposed to claims from:

(a) Taise-Zecon Joint Venture (without appointed the Respondent as the B Sub-General Contractor as mentioned in Paragraph 1 above); and

(b) Other Sub-contractor of the Respondent whose works have been affected or delayed or who have suffered loss and damages as result of the Appellant's breaches, defaults and delays.

C Accordingly, the appellant is liable to indemnity the respondent for or against such liabilities, damages or claims.

[27] With regard to the PBE's claim for additional costs in relation to the taking over of two works as pleaded in paras 15 to 19 of the defence and D counter claim, it was submitted that such claim should not be entertained because the takeover of the two works was by mutual agreement as evidence by contemporaneous exchange of letters between the parties as evidence at pp 64–65 Part A of the appeal record, and not as a consequence of termination for breach of the sub-subcontract works pursuant to cl 63.1 of the condition of E contract. Therefore, PBE cannot invoke cll 63.2 and 63.3 of the condition of contract to claim for the additional costs. There is also no provision for such claim in the mutual agreement for the taking over of the two works. In this regard learned counsel for PSB referred to PBE's letter dated 10 January 2005 which stipulate condition of the mutual agreement to take over the two works. F The material contents of that letter read as follows:

Please note that the above taking over will not release Syarikat Panon Sdn Bhd from their responsibilities and liabilities from FRSTL-EL Building as stated under the Subcontract terms and conditions before the taking over date as stated above.

Please also note that Syarikat Panon Sdn Bhd is responsible to undertake the G rectification of the defect works which included but are not limited to those stated in our letter referred ZEWSB/UMS/BC/1946/SPSB/12-04/7549 dated 29th December, 2004 before the taking over date as stated above.

In addition, ZEWSB will not be responsible for any debt which Syarikat Panon Sdn Bhd have owed to their workers, subcontractors, suppliers and any other parties H involved in the FRSTL-EL Building before the taking over date as stated above.

I

Therefore it was contended that the claim for the sum of RM4,759,436.80 as additional costs for the taking over of the two works has no basis whatsoever.

[28] Learned counsel for PSB also submitted that PBE's claim for damages in the sum of RM17,374,739.20 should not also succeed because it was not valid in law. It was contended that the claim was pursuant to cl 47.1 of the condition of contract which provide as follows:

> 47.1 Liquidated Damages for Delay
>
> If the Contractor fails to comply with the Time for Completion in accordance with Clause 48, for the whole of the Works or, if applicable, any Section within the relevant time prescribed by Clause 43, then the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default and not as a penalty (which sum shall be the only monies due from the Contractor for such default) for every day or part of a day which shall elapse between the relevant Time for Completion and the dated stated in a Taking-Over Certificate of the whole of the Works or the relevant Section, subject to the applicable limit stated in the Appendix to Tender. The Employer may, without prejudice to any other method of recover, deduct the amount of such damages from any monies due or to become due to the Contractor ...

[29] Citing a passage by Professor Vincent Powell-Smith, in his *The Malaysian Standard Form Of Building Contract (PAM/ISM 69)* at p 62 and Keating's *Building Contracts* at p 155, it was submitted that, where liquidated damages are agreed the employer (in this case PBE) only remedy for late completion is a sum not exceeding the specified amount; the employer does not have the option of claiming unliquidated damages. In this case, it was argued under cl 47.1 of the condition of contract it provides that if the contractor (in this case PSB) failed to complete the work within the stipulated time, then the contractor shall pay to the employer (ie PBE) the relevant sum stated in the appendix to tender as liquidated damages for such default subject to the applicable limit stated in the appendix to tender. It was further argued that under sub-cl 47.1 of the condition of contract the rate of liquidated damages for delay was fixed in the sum of 'equivalent to 1/1.000 (0.1%) of the Contract Price for each day of delay, up to a maximum deduction of ten percent (10%) of the Contract Price'. However, it was pointed out that in this case there is no appendix to tender was shown for the purposes of cl 47.1. Therefore, PBE cannot imposed LAD of RM17,374,739.20 on PSB. In support of this contention, learned counsel for PSB again relied on a passage by Professor Vincent Powell-Smith, in his *The Malaysian Standard Form Of Building Contract (PAM/ISM 69)* at p 83 which read as follows:

> If the Appendix is left blank, then no liquidated damages are recoverable, but in

such a case the employer would be able to recover general (unliquidated) damages by legal action on the basis of his actual proven loss. If the liquidated damages clause fails, the employer is also able to recover general damages by way of legal action, possibly subject to a ceiling on their amount equivalent to that of the failed provision.

[30] Other grounds advanced by PSB to resist the counterclaim of PBE for damages for the delay in completing the works in the 2005 Suit are firstly, the amount of claim exceeded the contractual limit claimable which is 10% of the contract price which in this particular case is RM4,828,800. Secondly, it was PBE that terminated the sub-subcontract of PSB. As a result of the termination, it was argued that PBE lost their right to recover any further LAD after the date of termination. Finally, to allow the claim for LAD by PBE would be an unjust enrichment on the part of PBE because PBE themselves were not liable to UNIMAS for any LAD.

[31] In the 2007 Suit, PBE had counterclaim against PSB the following:

Item	Description	
I	Cost of execution and completion of the Two Works and the Remaining Works	2,662,813.23
II	Cost of remedying the plaintiff's Defective Works and Non-Compliance Works	1,715,766.28
III	Damages for delay in completion	4,828,800.00
IV	All other expenses incurred	2,164,864.01
		11,372,243.52
V.	Less Retention Sum	2,072,422.51
VI.	Total due from the Plaintiff to the Defendant =	9,299,821.01

[32] This claim was pleaded in para 31 of the defence and counterclaim. For all these counterclaims PSB said that PBE is not entitled to because PBE had failed to prove its claim. Learned counsel for PSB cited the case of *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17 which had referred to a passage in the judgment of Lord Goddard in the case of *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89 which stated the principle that a party that bring action for damages must prove their damage.

[33] However, learned counsel for PBE submitted the claim for RM9,299,821.01 ought to be allowed because PSB had breached the contract when it failed to complete the two works ie the portion for FRST-EL building and the portion for CSD building. This is a fact and it is also a fact that PSE had delayed and had shown slow progress of work which had affected the works of other subcontractor and sub-subcontractors which forced the PBE to terminate PSB's contract and took over the completion of those works. As

regard the remaining works other than two works, PBE contended that after it had taken over the two works, PSB continued to delay in the completion of the other parts or portion of the sub-subcontract works or the remaining works. This resulted in PBE giving notice of taking over/termination to PSB pursuant to cl 63.3 of Part I of the Condition of Contract on 24 August 2005. PBE further submitted that after the notice of taking over/termination there was a joint site audit/inspection. Clause 63.3 of the general conditions of contract provide:

> If the Employer terminates the Contractor's employment under this Clause, he shall not be liable to pay the Contractor any further payment (including damages) in respect of the Contract until the expiration of the Defect Liability Period and thereafter until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum (if any) as the Engineer may certify would have been payable to him upon due completion by him after deducting the said amount. If such amount exceeds the sum which would have been payable to the Contractor on due completion by him, then the Contractor shall, upon demand, pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the Employer and shall be recovered accordingly.

[34] It was contended for PBE that when the latter took over the two works and subsequently the remaining works, PBE had to incur additional costs for the execution and completion of the two works and the remaining works and had suffered loss and damage. It was argued that through the evidence of DW2, PBE has proved that the total costs and expense for the execution and completion of the two works and the remaining works in respect of the FIRSTEL plus the CSD and the Ext Works and Infrastructure is RM2,662,813.23. Learned counsel also submitted that there are supporting evidence for the claim in exhs DBD3, DBD4, DBD5, DBD6, DBD7, DBD8 and DBD9 of the appeal record, Part C, Volumes 7, 8, 9, 10, 11, 12 13, and 14.

[35] As for the claim of RM1,715,766.28 as costs for remedying PSB's defective works and non-compliance works, it was submitted that notice had been given to PSB prior to the taking over or termination of the contract. Again, it was submitted that the evidence of this can be found in the testimony of DW2.

[36] As for the sum of RM4,828,800 which is the claim for LAD for delay in completion of the sub-subcontract works, it was argued that this sum is capped at 10% of the total contract sum of RM4,828,800 provided in the sub-subcontract.

[37] As for the other expenses incurred amounting to RM2,164,864.01, learned counsel for PBE submitted that these are for the expenses incurred in carrying out the remedying works as well as completing the incomplete works of PSB and it includes staff salaries, office overhead, machineries and utilities costs. Again, it was argued that the evidence of these is in the testimony of DW2.

[38] Finally, it was submitted that the evidence of DW2 on the amount claimed had not been seriously challenged and no credible evidence were put to the witness to dispute or deny the claim.

OUR OPINION

[39] On perusal of the grounds of judgment by the learned judge, we noted that the learned judge in dismissing the PSB's claim for the variation works had addressed the issue in the following terms:

> The other aspects of the plaintiff's claim are for the sum of RM1,897,506.76 concerning uncertified or under-certified variation works and completed steel structure work at the FRST-EL Ext. Lab and an additional sum of RM1,389,531.22 for uncertified and under-certified variation work. In the absence of any explanation as to why these payments were not included under Clause 60.1, supra, it is inconceivable that these sums remain outstanding. In addition, common sense dictates that producing before the court a complicated mass unsubstantiated facts and figures, including figures identical to the sums claimed as the plaintiff had done, without more, does not constitute proof of sums claimed.

[40] The learned High Court judge had applied the principle stated by Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89, which principle was applied by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17. The principle was stated as follows:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[41] We noted that in learned counsel for PBE's submission it was mentioned that the claim for the variation were submitted out of specified time. There was no reply to this argument, except that it was contended that PSB had written several letters to PBE Engineers on the variation but there was no respond. However, counsel for PBE's submitted that there were monthly meetings between PSB's representative, PBE's quantity surveyors and the employer's quantity surveyors in the course of the performance of the sub-subcontract where the validity, rates and amount of quantum of the variation works to be done or claimed were discussed. It was submitted, after

these matters were decided and determined by agreement at those meetings, the employer would certify to the main contractor, the amount which would in turn be certified to PBE and ultimately certified to PSB. In his submission, learned counsel for PBE pointed out to the second last column in Schedule II (1)–(4) p 466 of the appeal record Vol 1 Part C, that the figures stated the said column are the amount which had been agreed and which was then subsequently certified; and payment certificate were issued. It was further submitted that in respect of work or item claimed of which no figure or sum appeared in the second last column in Schedule II (1)–(4), PSB was not entitled to any payment because he had been agreed and decided so at the meetings. It was also shown to us that penultimate certificate of payment was issued after payment certificate No 34. This was confirmed by PW1 cross-examination. The penultimate certificate supercedes the earlier payment certificates and it shows that it was PSB that was owing monies to PBE in the sum of RM1,529,496.89.

[42] Based on the above submission, it was also contended that since PSB did not object to the certification of the relevant variation orders of which had been included in the payment certificate and which had been acted upon by the parties, PSB is now estopped from claiming for the purported variation works. Thus, PBE in resisting PSB's claim for variation work in relying on doctrine of estoppel as laid down in the case *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283.

[43] Learned counsel for PSB never challenged this submission about the monthly meetings and the agreement as to the rate and amount or quantum of the variation work to be done or claimed that was discussed at the meetings. On the evidence, we agree with the submission by the learned counsel for PBE that the variation works, the rate and the amount had been agreed at the said meetings and payment certificates issued based on those agreements. This is reflected in the figures that are shown in Schedule II (1)–(4) p 466 of the appeal record Vol 1 Part C. We also agree that since PSB did not object to the certification of the relevant variation works at the meetings and had acted on the payment certificates issued, PSB is estopped from denying that the variation works had not been certified or under-certified and had not been paid for. In this regard we take note that is a running account between PSB and PBE. The existence of this account is admitted by PW1 during cross-examination. The learned judge did not made any finding on the status of the running account. However he seemed to have accepted its existence. Learned counsel for PBE submitted that the running account contains record of advance payments made by PBE to PSB and which was repaid by PSB progressively through deductions. It is a fact that at the start of the sub-subcontract works PBE had advanced payment to PSB to the tune of RM4,828,800. Besides recording the sums certified and paid to PSB under the interim payment

certificate the running account also recorded amount owing by PSB to PBE for moneys paid by the latter for purchase of materials on behalf of PSB at the request of PSB. For example under cross examination PW1 had admitted that PBE had assisted PSB the purchase of tiles and steel bars. All these were not considered by the learned judge when he said in his judgment that the contention by PBE that the interim payment certificates were neither final or conclusive. The learned judge had formed that opinion by resorting to cl 60.4 of the conditions of the general sub-contract with gives authority to the engineer to omit or reduce any value of work from the interim certificate if he finds the works were not done or done not to his satisfaction. We think that is the wrong approach. We accept learned counsel for PBE submission that the learned judge should have made a determination what was the actual amount payable after taking into account the amounts owing under the relevant interim payment certificates and other sums owing between the parties. A point to note is that based on the interim certificates PSB had applied for summary judgment to the court. But the application was rejected. This shows that PSB need to prove the amount certified in the certificates or the amount that is not certified. More importantly PSB never appealed against that decision. Thus on the balance of probability we accept the submission that the interim certificates were neither final nor conclusive. Therefore we dismiss this part of the appeal by PSB.

[44] As regard to the PSB's claim for the return of the retention sum, we agree with the learned judge and the submission by the PBE's counsel that the PSB is not entitled to the retention sum. We say so because firstly, it is a fact that PSB never completed the work. It is true that the sub-subcontract was terminated by PBE. However, the termination was based on the reason which PBE said, had adversely affected the progress of the project. Secondly, with regard to the termination, PSB in its claim had pleaded for damages for wrongful termination. But, this head of claim was refused by the learned judge and it was not pursued by PSB before us. This gives the inference that PSB accepted the termination of the contract as valid for its failure to complete the works. Therefore, it cannot be right to say that PSB can rely on the termination of the contract to justify the return of the retention sum. Moreover, it is in evidence that PBE had spent moneys on ratification works after taking over the works that were supposed to be completed by PSB after the termination.

[45] In circumstances, we agree with the learned judge that PSB in Appeal No 2012 is not entitled to the return of the retention sum and accordingly we dismissed the appeal.

[46] The next matter to be determined in this appeal is whether the learned judge was right to dismiss PBE's counterclaim. PBE's counterclaim consists of two parts. The first part is the PBE's counterclaim in the 2005 Suit where PBE claims the following:

(a) loss of RM4,759,436.80 resulting from taking back works in respect of FRST Ext Lab and the CSD Building (see para 22 of the statement of defence and counterclaim);

(b) RM17,374,739.20 being liquidated and ascertained damages for delays (see para 23 of the statement of defence and counterclaim); and

(c) general damages for exposure to claims by Taisei-Zecon Joint Venture and PBE's other sub-contractors.

[47] The second part is the counterclaim in the 2007 Suit which is for the sum of RM9,299,821.10 and also for damages and interest and cost. At para 31 of the defence in the 2007 Suit, PBE pleaded this head of claim as follows:

> It was the plaintiff's failure to proceed with due expedition and due diligence and without delay to execute the sub-sub contractor works that led to the taking back of the two works and the issue of the Notice of Taking Over/Termination. Following the Notice of Taking Over/Termination, the defendant accordingly completed all relevant outstanding works. The cost and expenses incurred by the defendant is payable by the plaintiff to the defendant under Clause 63.3 and has been certified as RM9,299,821.10.

[48] The learned judge in dismissing PBE's counterclaims had made a finding that PBE's counterclaims in the the 2005 Suit and the 2007 Suit consists hopelessly a duplication and that the fact and the figures in the claims are unexplained and unsupported by evidence. Therefore, they do not constitute sufficient prove of the sum claimed. In coming to this finding, the learned judge had explained the reasons as follows:

> It is clear that the defendant's counterclaims consisting confusingly of duplications revolve around the non-completion of the works by the plaintiff at various stages. There is no controversy as to the fact that there was non-completion. That brings me to the question of the retention money of RM1,827,405.60 which the plaintiff is seeking to recover. Clause 12 of the letter of acceptance states that 50% of the retention money shall be released upon substantial completion of the works and the balance upon the expiry of the defect liability period. Neither event took place because of non-completion. Hence the retention money is not recoverable. By the same token, the defendant's counterclaim for liquidated and ascertained damages amounting to RM17,374,739.20 is equally misconceived since the question of delay in completion by the plaintiff does not arise because by virtue of the non-completion; completion of the works was undertaken by the defendant (see *Law Relating To Building And Engineering Contracts In India* 3rd Ed, p 699). The requirement of completion of the works as a condition for any claim to liquidated and ascertained damages is implicit by virtue of cl 47.1 read with cl 48.1. They are

in part as follows:

> Clause 47.1
>
> 'Liquidated Damages for Delay
>
> If the Contractor fails to comply with the Time for completion in accordance with Clause 48, for the whole of the Works or, if applicable, any Section within the relevant time prescribed by Clause 43, then the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default'.
>
> Clause 48.1
>
> 'when the whole of the Works have been substantially completed and have satisfactorily passed any Tests on Completion prescribed by the Contract'.

The defendant's contention for the loss of RM4,759,436.80 is untenable because it had agreed to take over the completion of the FRST Ext. Lab as well as the CSD Building. Paragraphs 14 to 19 of the Defence and Counterclaim in the first suit bear this out. Simply put, the defendant cannot approbate and reprobate.

The defendant's counterclaim for RM17,374,739.20 and RM4,759,436.80 representing exposure to claims by Taisei-Zecon Joint Venture and the defendant's other sub-contractors respectively apart from bing a frivolous duplication of the foregoing counterclaims has no basis, unsupported by authority or any of the provisions of the contract between the plaintiff and the defendant.

[49] Besides saying that PBE had failed to prove its counterclaims, the learned judge also dismissed the counterclaims on the ground of duplicity and that PBE had agreed to take over the two works (the completion of the FRST Ext Lab as well as the CSD Building) and therefore cannot claim for any losses.

[50] We will address the issue of duplicity first. At first glance at suits 2005 and 2007, there appears to be duplicity in PBE's counter-claims against PSB. However both suits have been consolidated and heard together. Therefore the two counterclaims in the suits merged into one wherever there is duplicity. More so when the counterclaims substantially arose from the same set of facts. Thus, the presence of duplicity in the counterclaim is not a valid ground for the learned judge to dismiss the same. What the learned judge ought to have done is to consider whether the claims are proven. If proven then they should be allowed to extent it is justified by the proven facts and the evidence by having regard to the purported duplicity.

[51] With regard to the proof of PBE's counterclaim, learned counsel for PBE submitted that extensive and comprehensive submission was made before the learned trial judge. It was contended that PBE through its witness DW2 (who had gave evidence by way of witness statement WSDW2) and the documentary exhibits tendered in court. At this juncture, we observe that

before us PBE strenuously pursuing its counterclaim in the 2007 Suit only for the total sum of RM9,299,821.01 which comprises of various head claims as itemised in para 32 of this judgment.

[52] As for PBE's claim for delay in completing the works, it is not in dispute that PSB had delayed. Notices of delayed works were sent to PSB and this was not denied. The evidence of this can be seen in the documents exhibited in PBE's bundle of documents marked in court as DBD1 and DBD2. The sum claim is RM4,828,800 which is capped at 10% of the sub-subcontract price of RM48,288,000 as agreed between the parties in the letter of offer.

[53] As for PBE's claim in respect of cost of remedying PSB's defective works or non compliance works, non compliance reports were sent to PSB seeking ratifications. These reports can be seen at pp 636–638 of DBD2 and is also supported by the evidence of DW2. The amount claim under this head is RM1,715,766.28. The details were pleaded in para 28 of the defence and counterclaim in the 2007 Suit.

[54] As to PBE's claim for cost of executing and completing the two works not completed by PSB and taken over by PBE together with other remaining works, this was pleaded in details at para 27 of the defence and counterclaim in the 2007 Suit. The amount claim is RM2,662,813.23. The proof of this can be found in the evidence of DW2 and supported by exhs DBD3, DBD4, DBD5, DBD6, DBD7, DBD8 and DBD9.

[55] Learned counsel for PBE also submitted that DW2 in his witness statement had also testified that by reason of PBE having to take over the works which PSB had failed to complete or had not complied with the works requirement, PBE had incurred expenses including staff salaries, office overhead, machinery cost and utility cost in the sum of RM2,164,846.01. This, he said ought to be allowed.

[56] We note that the learned judge had not adequately analysed the evidence adduced by PBE in support of its counterclaim for the total sum of RM9,299,821.01 after taking into account the retention sum which had been utilized to offset the claim which total amount had come up to RM11,372,243.52. The learned judge seemed it fit to dismiss the counterclaim by making a sweeping statement that 'common sense dictates that producing before the court a complicated mass of unsubstantiated facts and figures ... without more, does not constitute proof of sums claimed'. We are therefore of the opinion that the learned judge had not adequately exercised judicial appreciation of the evidence in so far as it relates to PBE's counterclaim. In consequence, we disagree with His Lordship's decision to dismiss PBE's counterclaim for the sum of RM9,299,821.01.

[57] Accordingly, Appeal No 2011 is allowed with costs. Appeal No 2012 is dismissed with costs. Costs RM20,000 to be paid by PSB to PBE for both appeals. Deposit refunded to each parties.

Appeal No 2011 allowed with costs; Appeal No 2012 dismissed with costs.

Reported by Afiq Mohamad